IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-774

PAUL LEE SWEENY, Executor and Trustee under the will of GERVAIS JOSEPH SEWELL, Deceased

Petitioner,

v.

GILBERT R. KNOWLTON, and BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PAUL LEE SWEENY, Pro Se
3124 North 10th Street
Arlington, Virginia 22201
(202) 393-0907

Counsel for Petitioner

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No.

PAUL LEE SWEENY, Executor and Trustee under the will of GERVAIS JOSEPH SEWELL, Deceased

Petitioner,

v.

GILBERT R. KNOWLTON, and BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

The petitioner Paul Lee Sweeny, Executor and trustee under the will of Gervais Joseph Sewell, deceased, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Virginia entered in this proceeding on June 23rd, 1977, to which judgment and opinion a Petition for Rehearing was timely filed on June 30, 1977 and denied by said Supreme Court of Virginia on September 2, 1977.

OPINION BELOW

The decrees of the Supreme Court of Virginia entered in this proceeding on June 23, 1977 and September 2, 1977, and the final decree of the Circuit Court of Fairfax County, Virginia, entered on November 5, 1976, and amended by said court on November 19, 1976, appear in the Appendix hereto. No opinion was rendered by the Supreme Court of Virginia nor by the Circuit Court of Fairfax County, Virginia.

JURISDICTION

The judgment and decree of the Supreme Court of Virginia was entered on June 23, 1977. Timely petition to set aside said decree and grant a rehearing thereto was filed on June 30, 1977 and the prayer of said petition was denied by said Supreme Court of Virginia on September 2, 1977. This petition for certiorari was filed within 90 days of the last mentioned date. This Court's jurisdiction is invoked under Title 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

1. Does the trial court injunction prohibiting defendant from selling or removing topsoil from his land "except where allowed by law" deprive him of his property without due process of law or deny to him the equal protection of the law?

2. Does the trial court injunction prohibiting defendant from dumping or discharging any substance of any type or description on his land, "except those substances which are permitted by law to be discharged", deprive him of his property without due process of law or deny to him the equal protection of the laws?

3. Did the failure of county to issue defendant the landfill permit he applied for deny to him the equal protection of the law.

4. Does the trial court decree requiring defendant to "implement" county's "restoration plan", bearing no relation to public health, safety or morals, deprive him of his property without due process of law.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV

* * * Deprivation of property, without due process of law * * * Denial of equal protection of the laws.

Section 1. * * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; now deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner's decedent, Gervais Joseph Sewell, hereinafter referred to as defendant, was a lifelong resident of Fairfax County, Virginia, where he was born on May 21, 1918, and died on January 10, 1977. On November 5, 1976, the Circuit Court of Fairfax County, Virginia entered its Final Decree below wherein it granted complainants, hereinafter county, the following relief, *inter alia*, (a) *enjoined defendant from selling or removing topsoil from his land except where allowed by law*; (b) *enjoined defendant from dumping or discharging on his land any substance of any type or description except those substances which are permitted by law to be discharged*; and (c) required defendant to implement county's "restoration" plan for defendant's land. Said final decree was amended on November 19, 1976 by providing that the aforesaid injunctions shall run with the land and be binding on purchasers of the land.

The county failed to allege or prove, at the trial, that it gave notice to defendant of the claimed violations of county zoning ordinances as Section 30-14.1 of said ordinance required the county to do. Defendant specifically raised the failures to give such notice as a defense to the county's suit. At the conclusion of county's evidence, defendant moved for a dismissal of the suit because the required notice was never given by county, but his motion was denied (TR. 4/12/76, pp 13-17). Again at the close of all the evidence, defendant again moved, in writing, to dismiss this suit for failure to give the required notice, but said motion was again denied.

In the spring of 1974, defendant was advised by certain Fairfax County officials to submit an application for a permit to operate a landfill on his property located at 2051 Great Falls Street, in Fairfax County, Virginia, accompanied by a grading plan for the property showing erosion. These officials were Guy Grimes, a county employee under Inspection Services, whose duty it was to inspect land pursuant to applications for landfill permits, and William W. Smith, Jr., Assistant Branch Chief of the Plan Review Branch, who had authority to grant landfill permits, both of whom advised defendant that he would probably be granted a landfill permit if he submitted the grading plan. As a result of the suggestions of these two county officials, defendant submitted the specified plans (TR 4/13/76, p 50) showing grading and sedimentation control on defendant's property, said plans having been prepared by George Korte, land surveyor, at a cost to defendant of $600.00. Korte remained in contact with the county concerning defendant's landfill permit application (TR 4/13/76 p 53).

The application was accordingly submitted to the Plan Review Branch along with detailed proposed grading and sedimentation measures. The plans were reviewed by the assistant branch chief and he found nothing basically wrong with them (TR 4/13/76, p 40). The assistant branch chief intended to grant the permit but his authority to approve such grading plans was withdrawn on

July 11, 1974, after defendant's application was filed and before the assistant branch chief could grant the permit. When the application was received the assistant branch chief was working under the erosion and sediment control ordinance (TR. 42); after the application was filed the criteria for granting such application were changed and more things were applied than just erosion and sediment control, including compatibility with a particular community, which was not considered before the application was filed. This change in criteria resulted in county instructions to the assistant branch chief to deny defendant's permit because it was allegedly not compatible with the particular community. Prior to July 11, 1974, the date of the change in the assistant branch chief's authority, authority to authorize landfill permits came within the erosion and sediment control provisions of the county ordinance. The only reason given by the county for denying defendant's landfill permit was the fact that his property was situated in a residential community (TR 45); however, admittedly previous applications for landfill permits had been granted in residential communities in the county, and, none had theretofore been denied because of the residential nature of the community in which the land was situated, prior to the denial of defendant's permit (TR 46, 47).

County never told defendant why his application to operate a landfill on his land was not granted. It was revealed by the evidence in this case that improper and discriminatory conduct on the part of other county officials caused defendant's permit to be denied. A member of the Board of Supervisors interfered and prevented the Chief of the Plan Review Branch from carrying out the duties of his office in accordance with the well established rules that existed at the time defendant applied for his permit. As soon as defendant learned, during the trial of this case, of the improper interference which caused county to deny his landfill permit application, he asked the trial court for leave to amend his pleadings to include a specific prayer that the trial court enter a declaratory judgment declaring that defendant

had a vested right to the landfill permit in accordance with the grading and sedimentation control plans submitted by defendant's engineer to county's Plan Review Branch, but the trial court denied defendant's request and denied him any relief whatsoever.

County had issued defendant licenses for each of the years 1974 and 1975 to operate a landfill on defendant's land (TR 4/13/76, p 15, 16; defendant's Exhibits Nos. 14 and 15). The landfill licenses were issued to defendant by Robert W. Johnson, Jr., an employee of county's office of assessments for 17 years, and county received defendant's money for the landfill licenses. No landfill licenses were required by county until January 1, 1974. Before issuing defendant landfill licenses for the years 1974 and 1975, Johnson talked with Wallace S. Covington, Jr., county's assistant zoning administrator, and with one Strickhouser, of county's environmental management office, and both gave Johnson the impression that county could not stop defendant from operating a landfill on defendant's land (TR 4/13/76, p. 12; defendant's exhibit 13). Neither of the aforesaid landfill licenses issued to defendant were ever revoked (TR 4/13/76, p. 20).

County's director of division of mapping, John Lay, testified for county, from aerial photographs of defendant's land taken in 1964, and on cross-examination, said:

> "(T)his is disturbed, and some dumping along the stream valley at this point"
>
> * * *
>
> "Q. Can you tell us what type of dumping? Is it debris would you say?
> "A. What ever the dumping is, it is not of a consistent matter, I would say that much, * * * You see these two manholes here, in later photography the stream moves over to the east side of those manholes, *which indicates that there is a tremendous amount of fill in there to have shifted it that far.*" (Emphasis added) (TR 4/19/76, p. 41).

The foregoing testimony of county's witness as to landfill on defendant's land in 1964 was never contradicted.

The trial court, after hearing all evidence, found "spasmodic depositing of things" on defendant's land from time to time down through the years, not amounting to a nuisance. The trial judge then said to county's counsel:

> "As far as the prayed for relief in your memorandum you're asking that I order him to cover it (the landfill) up and revegetate the entire property.
> "Mr. Stitt (county's counsel): That's to return it to the state it was in before he started illegally operating the landfill.
> "The Court: Well, I want to think about that a little bit.
> "Mr. Stitt: The topsoil - a substantial amount of it is already there on the property. It could be used to cover what's already there. Otherwise, the eyesore part of the nuisance remains.
> "The Court: *I thought the Supreme Court said that eyesore isn't enough for a nuisance.*
> "Mr. Sweeny: I don't believe this court has yet said it is a nuisance. * * *
> "The Court: I'll rule this way. The trucks going up and down that highway are a nuisance themselves. *I can't say that they're Mr. Sewell's nuisance.* . . . Enjoining him (defendant) from operating a landfill would probably prevent 99 percent of the trucks * * * (H)e's got a right to use some trucks, because of his farm business and because of his nonconforming landscaping and excavation business, which the evidence does disclose was in existence for many years prior to the adoption of any zoning ordinance by the County of Fairfax. So, its rather interesting evidence really, anybody going out and dragging roads and such. But, obviously, he has a right to have some vehicles to maintain those uses of the land.
> "But, you know, you could have 100 trucks an hour coming down that road, and they could be going to some place other than Mr. Sewell's property. So, really, *it's the trucks that are the problem.* If more trucks come down the road, it's up to the parties that have an interest to—if they violate the law, to bring it to the attention of the law enforcement authorities." (Emphasis added) (TR. 5/7/76, pp 6-8).

Wallace S. Covington, Jr., county's assistant zoning administrator, testified that digging of topsoil to a depth of 18 inches was permitted in residential areas until 1974; that in 1974 the ordinance was amended to limit the area dug to 5000 square feet; that there were no restrictions at all on topsoil removal prior to 1959; that the filling of the swale on defendant's property would be a nonconforming use if it had been continuous over the years and hadn't ceased for as much as two years (TR. 4/12/76, p. 25) and that in any case involving a claimed nonconforming use of land, county uses the same procedure, which is to go into an area under the supposition that a nonconforming use exists and contact neighbors to establish the status of the use (TR. 4/12/76, p. 30).

County's zoning administrator, Gilbert Knowlton, testified that it was not until December 1975 that county's zoning ordinance was enacted to include a definition of "landfill" (defendant's exhibit 16), and by such definition, the term "landfill" specifically excludes the dumping of clean dirt (TR. 4/13/76, pp 29, 30); that a number of grading permits were issued by county for the operation of landfills in residential areas prior to passage of the aforesaid December 1975 amendment to the zoning ordinance (TR. 4/13/76, p. 28); that without any action on the part of landowner, dumping of clean dirt remains a permissive use in residential areas where an operation does not go more than 18 inches in depth nor extend over more than 5000 square feet, maybe to fill a whole cistern that might be on the land (TR. 4/13/76, pp. 30, 31); that a permit to dump clean dirt is only required in residential areas if it exceeds 18" or 5000 square feet, and that, *in any case, depositing of dirt per se could possibly be done if it were clean dirt* (TR. 4/13/76, p. 35). County admitted, in answer to interrogatory number 21 propounded by defendant that "*dirt may be discharged pursuant to agricultural use*" of the land.

County's director of department of environmental management, John Yaremchuck, by letter dated July 16, 1975 to defendant, advised defendant as follows:

"According to the records of this office, *your property located at 2051 Great Falls Street has been operating for a number of years as a farm and general landscape business. Much of the operation on this property is apparently nonconforming under the terms of our present zoning ordinance.*" (TR. 4/13/76, pp. 3, 4; defendant's exhibit 10) (Emphasis added).

REASONS FOR GRANTING THE WRIT

1. THE INJUNCTION BELOW PROHIBITING DEFENDANT FROM SELLING OR REMOVING TOPSOIL FROM HIS LAND "EXCEPT WHERE ALLOWED BY LAW" DEPRIVED DEFENDANT OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW, AND DENIED HIM THE EQUAL PROTECTION OF THE LAW, IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

a. Defendant is entitled to know whether he has violated the court's injunction at the time he does, or fails to do, the act which is charged to be a violation thereof. The injunction below leaves the parties to speculate and conjecture to determine what topsoil removal is "allowed by law". It deprives defendant's successors of the use of the land without due process of law. Defendant contended in the lower courts, and now contends, that the aforesaid injunction is invalid on its face because it is too vague and indefinite to apprise defendant of what he may or may not do.

As the Court of Errors and Appeals of New Jersey said, in *Evening Times Printing and Publishing Company v. American Newspaper Guild et al.*, 124 NJ Eq. 71, 199 A. 598, 601 (1938):

"The restraint in paragraph (g) is '*From making any illegal effort* to coerce the complainant to enter into any contract or agreement with all or any of the defendants.' The emphasis is upon the 'illegal' phase of the effort. *It is illegality that is restrained. How are the defendants to know with certainty whether a proposed act is or is not illegal*? Disobedience of an injunctive order may be followed by a finding of guilt in criminal contempt and by punishment accordingly. *A writ of injunction should be the criterion for the person who is enjoined. It should be plain and certain on the face of it* (citation omitted). To restrain the threatening or doing of things 'unlawful' and not to point out what specific acts are under restraint is to leave the order vague and uncertain. *Bayer v. Brotherhood of Painters, etc.*, 301, 108 N.J. Eq. 257, 259, 154 A. 759.

"We consider that paragraph (g) of the order and also paragraphs * * * which use comparable expressions are vague and uncertain as to the acts to be restrained and therefore should not stand." (Emphasis added).

In *Commonwealth ex rel. Costa v. Boley* 441 Pa. 495, 272 A. 2d 905, the Court said (p. 908 of 272 A 2d):

> "Even if the complaint made out a case demanding the issuance of an exparte preliminary injunction, we would still vacate the decree now before us, because it is void on its face. The injunction enjoins appellant from violating '* * * all other laws of the Commonwealth.' It is well established that equity will not act merely to enjoin the commission of a crime * * *
>
> "* * * That provision (Drug, Device and Cosmetic Act) in no way provides a chancellor with a carte blanche to enjoin someone * * * from violating 'all other laws of the Commonwealth'. * * * It is not for courts of equity to summarily superimpose broad injunctions on this criminal legislation, thereby subjecting defendants to possible summary contempt proceedings in addition to the penalties fixed by the legislative branch * * *
>
> "* * * Such a decree should be as definite, clear and precise in its terms as possible, so that there may be no reason or excuse for misunderstanding or disobeying it; * * *' "

Another case enunciating the foregoing principles is *Hopkins et al v. Frenchy et al*, (Texas 1934) 75 SW 2d 184, 186, where the Court said:

> "The order appealed from is meaningless and unenforceable, in that it simply prohibits appellants from 'unlawfully' interfering with the 'lawful' operation of appellees' business. It defines and specifies no acts to be restrained, but leaves the parties to speculate and conjecture to determine what is 'unlawful interference', and what is 'lawful operation' of a road house and garden."

In 43 *Corpus Juris Secundum* (Injunctions) Section 206 at page 933 there are an avalanche of cases cited in footnote 86 (there being none cited to the contrary) in support of the following text:

> ". . . an injunction should be so clear and certain in its terms that defendant may readily know what he is restrained from doing and that he must obey it at his peril. *An injunction restraining* the threatening or doing of *things unlawful which does not specify what specific acts are under restraint, is vague and uncertain* * * *". (Emphasis added).

Additional cases supporting defendant's contention that the aforesaid injunction is too vague and indefinite to be enforced are:

Maheu v. Hughes Tool Company (Nevada 1972) 503 P.2d 4; *Stinson v. Barksdale* (Sup. Ct. Miss. 1971) 245 So 2d 595; *National Airlines Inc. v. Airline Pilots Association, International*, (Fla. 1963) 154 So.2d 843; *Hollington v. Ricco*, 40 Ohio App. 2d 57, 318 NE 2d 442 (1973); *Yonadi v. Homestead Country Homes*, 35 N.J. Super 514, 114 A 2d 564.

Defendant has found no decided case upholding an injunction proscribing certain conduct "*except where allowed by law*" and it is submitted there are none. The cases to the contrary are legion, including the foregoing citations, and are unanimous in their condemnation of the vague and indefinite language under discussion.

The trial court said defendant had a right to remove topsoil from his land. The injunction complained of does not attempt to define to what extent defendant could do so. It would have been a simple matter to spell out in the injunction when and how much topsoil could be removed. No attempt was made to do so. The writ of injunction sets forth no criteria for defendant's guidance. It is not plain and certain on its face. It is vague, indefinite and uncertain and leaves to speculation and conjecture the amount of topsoil removal that is allowed by law.

It is therefore submitted that the said injunction is too vague, uncertain and indefenite to be enforced and that the same should be vacated or modified to at least spell out what amount of topsoil can be removed from defendant's land. Since the injunction, as amended on November 19, 1976, is binding on defendant's successors, the need for clarifying its terms are compelling as the land must be sold. The injunction complained of will chill bidding on this valuable land, consisting of approximately 18 acres on the city limits of Falls Church, Virginia, if indeed the same can now be sold at all, burdened as it is with the aforesaid vague, uncertain and indefinite provision concerning removal of topsoil and discharging of any substance thereon.

In *Caldwell v. Commonwealth*, 198 Va 454, 458, 94 SE 2d 537, a case involving a statutory enactment, the Court defined the principles there applicable which are equally applicable to the injunctions here involved, as follows:

> "It is elementary that an act creating a statutory offense, to be valid, must specify with reasonable certainty and definiteness the conduct which is commanded or prohibited, that is, what must be done or avoided, so that a person of ordinary intelligence may know what is thereby required of him. 14 Am. Jur., Criminal Law, s. 19, pp. 773, 774; 22 C. J. S., Criminal Law, s. 24-a, pp. 70-72. The enactment should define the acts to be done or not to be done which constitute such offense with such certainty that a person may determine whether or not he has violated the

> law at the time he does or fails to do the act, which is charged to be a violation thereof. *State v. Lantz*, 90 W. Va. 738, 111 S.E. 766, 26 A. L. R. 894. Unless an act creating a statutory offense satisfies this requirement of certainty and definiteness it violates the Due Process Clauses of the Fourteenth Amendment and of the Virginia Constitution. Article I, s. 8."

It is respectfully submitted the injunction complained of fails to satisfy the requirement of certainty and definiteness and violates the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, and in the interest of justice should be changed to define the acts to be done or not to be done with such certainty that a person of ordinary intelligence may determine whether he has violated the injunction *at the time he does or fails to do the act which is charged to be a violation thereof.*

b. There are many decided cases which hold statutes prohibiting the excavation of topsoil or other natural products of the soil are an unconstitutional exercise of local legislative power. *Town of Harrison v. Sunny Ridge Builders*, 8 N.Y.S. 2d 632 and cases cited on page 635. Defendant raised this defense in the trial court in paragraph 5 of his Answer to Second Amended Bill by alleging

> "that insofar as said zoning ordinance may purport to prevent the removal of natural products of the soil, or the filling of defendant's land * * * the same is unreasonable, unconstitutional and void because lacking in due process of law."

c. It is defendant's contention, in addition to all other considerations, that the carrying on of landscape and excavation businesses, which the trial court found defendant entitled to do, *necessarily includes the sale of topsoil as being customarily incidental at least to the landscape business.*

County totally failed to adduce any evidence at the trial to show that the sale of topsoil is not "customarily incidental and subordinate to" the carrying on of a landscape or excavation

business. It bore the burden of proof in this regard. *Wiley v. Hanover County*, 209 Va 153, 163 SE 2d 160; Sections 30-1.8.36.1 and 30-3.2.1 of county's Zoning Ordinance (defendant's Exhibit 1 of 4/7/76).

d. The trial court acknowledged defendant's right to remove topsoil from his land, as appears from the Transcript of Proceedings of May 7, 1976, pages 13, 17:

> "The Court: * * * You're praying for an injunction to prevent him from removing topsoil at all. He's got a right to remove topsoil under the code".
>
> "The Court. You've requested that he be permanently enjoined from removing topsoil from the real property. I'm just adding to that except as allowed by law."

For all of the foregoing reasons it is respectfully submitted that the decree enjoining defendant from selling or removing topsoil, except where allowed by law, is an unconstitutional deprivation of property without due process of law.

e. County failed to give defendant notice of alleged violations of its zoning ordinance and its suit should have been dismissed on that ground. The giving of notice by county is a requirement of the very ordinance the instant suit is based upon (Section 30-14.1 of the Fairfax County Zoning Ordinance; defendant's Exhibit 1, 4/7/76). In the absence of notice there is no liability for penalties under the terms of county's zoning ordinance. In *Village of Laurel Hollow v. Laverne, Inc.*, (1965) 262 N.Y.S. 2d 622, the Court said:

> "* * * *(T)he liabilities for penalties were incurred only after service* of a notice to abate the violation of the ordinance * * *." (Emphasis added).

Thus, county failed to comply with a mandatory condition precedent (notice) contained in the very zoning ordinance its suit is grounded upon. It has sought to enforce certain provisions of the ordinance and has obtained injunctions in this suit while ignoring other provisions of the same ordinance requiring it to first give defendant notice of the alleged violations and a

reasonable opportunity to correct the same. County may not select certain provisions of the ordinance and ask the courts to enforce the same while ignoring equally important provisions of the same ordinance designed to afford landowners due process of law. County did not give defendant notice of the alleged violations nor an opportunity to correct the same and accordingly county's suit against defendant was lacking in due process of law according to county's own standards (TR. 4/12/76, pp. 13-17; TR. 5/7/76, pp. 2-4).

The Trial Court should have enforced the aforesaid notice requirement against county and dismissed this suit for failure to comply with the same.

2. THE INJUNCTION PROHIBITING DEFENDANT, AND HIS SUCCESSORS, FROM DUMPING OR DISCHARGING ANY SUBSTANCE OF ANY TYPE OR DESCRIPTION ON HIS SAID LAND *"EXCEPT THOSE SUBSTANCES WHICH ARE PERMITTED BY LAW TO BE DISCHARGED"*, DEPRIVES DEFENDANT AND HIS SUCCESSORS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW AND DENIES TO THEM THE EQUAL PROTECTION OF THE LAWS.

a. This injunction discriminates against defendant and his successors and makes their land the only land in Fairfax County, Virginia, or elsewhere as far as is known, that the owner cannot dump or discharge clean dirt upon without the risk of being found in contempt of court, *notwithstanding county's own evidence that clean dirt can be deposited in any case by all other landowners in Fairfax County*. (TR. 4/13/76, p. 35). The injunction further discriminates against defendant and his successors by making their land the only land in Fairfax County, Virginia, or elsewhere as far as is known, where a driveway or

other improvement requiring the bringing in and depositing of materials, cannot be built without risking a comtempt of court citation for violating the court's injunction.

b. It is manifestly clear from the record in the trial court that the real purpose of the injunctions in this case is to stop the flow of trucks along and upon the highways in the vicinity of defendant's land (TR. 5/7/76, pp. 6-8). It is equally clear that the trucks had a right to a lawful use of the public highways, and the trial judge conceded as much. *Granting the injunctions to stop the trucks was, therefore, for an impermissible purpose, and violated defendant's constitutional rights to due process of law and to equal protection of the laws.* No injunctions were granted to stop trucks going to other people's property. Only defendant's property was chosen for this proscription.

c. The reasons and citations set forth in subparagraph (a) of Part 1, Reasons for Granting the Writ, *supra*, to demonstrate that the injunction against selling or removing topsoil from defendant's land, "except where allowed by law", deprived defendant of his property without due process of law, and denied to him the equal protection of the law, are equally applicable to this Part 2 of this Petition. Those authorities hold that an injunction must not be vague, uncertain or indefinite, and must be sufficiently definite to enable a person of ordinary intelligence to know what he may do, or may not do, at the time he does, or fails to do those acts which the injunction proscribes.

County continues to exact annual real estate taxes on the land here involved in ever increasing amounts, while depriving the owners of much of the lawful use of the land by means of the injunctions. As a result the land sits idle and unproductive while the unpaid taxes continue to mount higher and higher.

d. The trial court found there was "spasmodic" dumping on defendant's land that antedated the zoning ordinance (TR. 5/7/76, p. 6), but said it did not rise to the level of a non-conforming use. It is submitted the Trial Judge thereby reached an erroneous conclusion. Since there was "spasmodic" dumping

prior to the zoning ordinance of 1965, the "spasmodic" dumping was a non-conforming use of the land which defendant ought to be allowed to continue to the same extent as he did before the zoning ordinance was enacted.

3. COUNTY'S REFUSAL TO ISSUE DEFENDANT THE LANDFILL PERMIT DENIED TO HIM THE EQUAL PROTECTION OF LAW.

a. The uncontradicted evidence in this case shows that defendant was encouraged by county employees Smith and Grimes to apply for a landfill permit on his land in 1974. Those officials advised defendant he would probably be granted the permit if he applied for it and submitted detailed erosion and sedimentation control plans along with his application. The plans were prepared at a cost to defendant of $600.00, and submitted to county. Smith intended to grant the landfill permit, as he had previously granted a number of landfill permits in residential areas, and none had been turned down (TR. 4/13/76, pp 46, 47). He reviewed the plans and found nothing basically wrong with them. However, while defendant's application was on file and pending, county changed Smith's authority to grant the permit by requiring him to consider more things than just erosion and sediment control. Compatibility with a particular community became a criterion in defendant's case, county said, but it had not been a criterion in any case previous to defendant's.

The changing of standards by county officials after defendant's application and plans for a landfill permit were on file, in order to deny defendant a permit, after having issued permits to all previous applicants similarly situated was arbitrary and capricious and denied to defendant equal protection and due process of law.

When defendant filed his grading and sedimentation control plan which complied with all existing county requirements he

then acquired a vested right to the permit. *Board of Supervisors of Fairfax County, Virginia v. Medical Structures, Inc.*, 213 Va 355, 192 SE 2d 799; *Board of Supervisors of Fairfax County, Virginia v. Cities Service Oil Co.*, 213 Va 359, 362, 193 SE 2d 1.

It is not permissible to leave to county functionaries the unrestrained and undefined authority to grant or refuse permits for which county ordinances purport to make provisions, Goldstein v. Conner, 212 Mass. 57, 59, 98 N.E. 701, where the court said (at page 59 of 212 Mass. and at page 702 of 98 N.E.):

> "A use of property lawful in itself and having no essential tendency toward harm to the public, while it may be subject to reasonable regulation, *cannot be made utterly dependent upon the unrestrained arbitrament of the board of aldermen*". (Emphasis added).

b. "Landfills" in Fairfax County were never considered by county to be a violation of residential zoning, nor were "landfills" considered by county to be a business when the business license (BPOL) ordinance was enacted effective January 1, 1970. No business license was required to operate a landfill until January 1, 1974 (defendant's Exhibits 11 and 12). County issued defendant licenses to operate a "landfill" business for each of the years 1974 and 1975 for which defendant paid county the prescribed fees (defendant's Exhibits 14 and 15). County claimed a right of revocation of the "landfill" licenses should they not be approved by its zoning authorities, *but no such revocation ever occurred.* R. W. Johnson, of county's department of assessments, by written memorandum dated April 7, 1975 (defendant's Exhibit 13), stated that Donald Strickhouser, of county's department of environmental management, on April 3, 1975 "*gave me the impression that the county could not stop Mr. Sewell from operation of the landfill even though no permits have been issued*".

In *Wildlife Preserves, Inc. v. Poole*, 84 N.J. Super 159, 201 A2d 377, it was squarely held that the mere filling of land in a residential district does not constitute a business use in violation of a zoning ordinance, the Court saying (p. 379 of 201 A 2d):

> "(3, 4) We hold that a reasonable sanitary landfill operation in a residential district does not in and of itself constitute a business use in violation of a zoning ordinance (citation omitted)."

There being no legal impediment thereto, county should have issued defendant the landfill permit for which he applied, subject to such reasonable regulations as the public interest may have required. Its failure to do so after issuing permits to all other applicants, denied defendant due process of law and denied to him the equal protection of the law.

4. THAT PORTION OF THE TRIAL COURT'S DECREE WHICH REQUIRES DEFENDANT TO "IMPLEMENT" COUNTY'S "RESTORATION PLAN", WHICH IS IN REALTY A BEAUTIFICATION PLAN BEARING NO RELATION TO PUBLIC HEALTH, SAFETY OR MORALS, IS A DEPRIVATION OF DEFENDANT'S PROPERTY WITHOUT DUE PROCESS OF LAW.

Stream pollution on defendant's land was caused solely by county dumping large quantities of leaves thereon over a period of many years. This fact was recognized by the Trial Judge when he said (TR. 2/6/76, pp. 55, 56):

> "The Court: Just so it will be clear, the County is not absolved of responsibility for abating this nuisance (pollution from leaves) * * * Because the County did participate in creating the nuisance."

W. W. Smith, Jr., county's only witness on its "restoration" plan for defendant's land, testified on cross examination on October 14, 1976, that he found no problem about stream pollution (TR. 10), that there is no need for further action to prevent "leachate" (TR. 13); that the area where county dumped

the leaves on defendant's land doesn't require anything at all (TR. 14); and that the remaining area of the fill will only require seed and mulch when the grading is finished.

The only justification for any other "restoration" of defendant's land is beautification, which is not a permissible objective, since aesthetic considerations alone do not justify interference under police or injunctive regulation of defendant's land. *Peck v. Kennedy*, etc, 210 Va 60, 64, 168 SE 2d 117. There is no legal justification for county's restoration plan and no legal basis upon which to penalize defendant's successors the large expenditures its plan will require in order to beautify property upon which county dumped large quantities of leaves over a period of many years at no cost to taxpayers.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the Judgment of November 5, 1976 as amended by the order of November 19, 1976, the judgment and opinion of the Supreme Court of Virginia entered on June 23rd, 1977, and the decree of the said Supreme Court of Virginia on September 2, 1977 denying the Petition for Rehearing; or, at the least, that the said orders of November 5, 1976 and November 19, 1976 be modified by spelling out therein how much topsoil may be removed from the land and what substances may or may not be discharged on said land without the necessity of defendant's successors scanning the whole spectrum of the law in an attempt to ascertain how much topsoil removal is "allowed by law" and what substances "are permitted by law to be discharged" upon the said land.

Respectfully submitted,

Paul Lee Sweeny, Pro Se
3124 North 10th Street
Arlington, Virginia 22201
(202) 393-0907

Counsel for Petitioner

APPENDIX

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 2nd day of September, 1977.

Paul Lee Sweeny, Executor
and Trustee, etc., Appellant,

against Record No. 770305

Gilbert R. Knowlton, et al., Appellees.

Upon a Petition for Rehearing

On mature consideration of the petition of the appellant to set aside the decree entered herein on the 23rd day of June, 1977, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

/s/ H. G. Turner
Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 23rd day of June, 1977.

The petition of Paul Lee Sweeny, executor and trustee under the will of Gervais Joseph Sewell, deceased, for an appeal from and supersedeas to a decree entered by the Circuit Court of Fairfax County on the 5th day of November, 1976, in a certain chancery cause then therein depending, wherein Gilbert R. Knowlton and another were plaintiffs and Gervais Joseph Sewell was defendant, having been maturely considered and a transcript of the record of the decree aforesaid seen and inspected, the court being of opinion that there is no reversible error in the decree appealed from, doth reject said petition, and refuse said appeal and supersedeas, the effect of which is to affirm the decree of the said circuit court.

Record No. 770305

A Copy,

Teste:

Howard G. Turner, Clerk

By: /s/ Allen L. Lucy

Deputy Clerk

VIRGINIA:
IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GILBERT R. KNOWLTON, et al.,

Complainants,

v. IN CHANCERY No. 48079

GERVAIS JOSEPH SEWELL,

Defendant.

FINAL ORDER

THIS CAUSE came on to be heard the 7th, 12th, 13th and 19th days of April, the 7th and 21st days of May, the 25th day of June, and the 14th day of October, 1976, upon Complainants' Bills of Complaint and upon evidence presented by Complainants and Defendant, and was argued by counsel; and

IT APPEARING TO THE COURT that at the time of issuance by this Court of a temporary injunction by order dated December 18, 1975, and at the time of issuance by this Court of an order of abatement dated January 21, 1976, that a substance emanating from a leaf pile situated on real property owned by defendant Sewell and located at 2051 Great Falls Street in Fairfax County, Virginia, was polluting state waters, to wit, Burke Spring Branch, in violation of §17-7 of the *Fairfax County Code* and of statutes of the Commonwealth of Virginia, and that said substance was causing an objectionable odor to individuals of ordinary sensibility, in violation of § 1A-9 of the *Fairfax County Code*, and that the condition and location of said substance was creating a nuisance; it is hereby

ADJUDGED, ORDERED and DECREED that the temporary injunction against said pollution, odor and nuisance entered in this cause by order of this Court on December 18, 1975, and continued in full force and effect *pendente lite* by orders of this Court of January 16, 1976, and February 11, 1976, be, and hereby is, made permanent; and

IT FURTHER APPEARING TO THE COURT that at the time of issuance by this Court of a temporary injunction by order dated January 16, 1976, that a landfill operation was being conducted on said real property owned by defendant Sewell, which real property is located in the RE-1 (residential, one-acre) zoning category, and that said landfill operation was in violation of §§ 30-2.2.1 and 30-2.2.2 of the *Zoning Ordinance of Fairfax County* and of *Va. Code Ann.* §§ 21-89.6 and 21-89.11, and constituted a nuisance; it is hereby

FURTHER ADJUDGED, ORDERED and DECREED that the temporary injunction against said landfill operation, and against the dumping or discharge on said real property of any substances of any type or description, except those substances which are permitted by law to be discharged, entered in this cause by order of this Court on January 16, 1976, and continued in full force and effect *pendente lite* by order of this Court of February 11, 1976, be, and hereby is, made permanent, and the defendant is directed to implement by December 14, 1976, the restoration plan set forth in the document accepted by the Court at the October 14 hearing as Complainants' Exhibit Number 1 and adopted by the Court as the restoration plan for the said real property; and

IT FURTHER APPEARING TO THE COURT that the following junk vehicles are stored on said real property, in violation of §§ 30-2.2.1, 30-2.2.2, 30-1.8.18.1, and 30-3.2.1.4.1 of the *Zoning Ordinance of Fairfax County*: Autocar dump truck, no tags; dump truck, no motor, 1972 Virginia tags T307-370; White tractor, 1972 Virginia tags Y8-099; it is hereby

FURTHER ADJUDGED, ORDERED and DECREED that defendant Sewell be, and hereby is, permanently enjoined from storing junk vehicles on said real property, and the defendant is directed to remove, on or before December 5, 1976, the junk vehicles listed in the preceding paragraph, and if ownership or control be retained to transport them to a location where they lawfully may be situated; and it is

FURTHER ADJUDGED, ORDERED and DECREED that the order of this Court of May 7, 1976, permanently enjoining sale or removal of topsoil from said real property owned by defendant Sewell, except where allowed by law, be, and hereby is, incorporated herein by reference; and it is

FURTHER ADJUDGED, ORDERED and DECREED that this Court will retain jurisdiction of this cause for purposes of directing and supervising execution of appropriate remedial action and abatement by the Defendant. This decree is FINAL. Defendant has leave to file written objections within 7 days.

ENTERED this 5th day of November, 1976.

/s/ William G. Plummer
Circuit Court Judge

WE ASK FOR THIS:

FREDERIC LEE RUCK
COUNTY ATTORNEY

By /s/ David T. Stitt
David T. Stitt
Assistant County Attorney
4100 Chain Bridge Road
Fairfax, Virginia 22030
(703) 691-3371
Counsel for Complainants

SEEN AND EXCEPTED TO:

By /s/ Paul Lee Sweeny, Esq.
3124 N. 10th Street
Arlington, Virginia 22201
Counsel for Defendant

VIRGINIA:
IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GILBERT R. KNOWLTON, et al.,

Complainants

v. IN CHANCERY NO. 48079

GERVAIS JOSEPH SEWELL,

Defendant

ORDER FIXING SUSPENDING BOND, ETC.

THIS CAUSE came on to be again heard on November 19, 1976, pursuant to notice, upon Defendant's Motion to Fix a Suspending Bond herein, and for other relief, and was argued by Counsel, whereupon the Court doth

ADJUDGE, ORDER AND DECREE that the Final Order entered herein on November 5, 1976, be, and it is hereby amended to include the following recital: That this Decree shall not in any form or manner affect title to the real property involved in this proceeding, however sale of said property shall not relieve defendant, or his successors of responsibility with regard to this cause.

WHEREUPON the defendant, by counsel, having indicated his intention to apply to the Supreme Court of Virginia for an appeal from the aforesaid Final Decree of November 5, 1976, with Supersedeas, it is

ORDERED that the execution of the judgment, insofar as it requires positive action by the defendant to complete the restoration plan, be suspended for a period of four months and

thereafter until the said Supreme Court of Virginia acts upon the petition for appeal, if the same be filed within the said four months, PROVIDED HOWEVER, that this suspension shall not become effective unless the defendant, or someone in his behalf, shall enter into bond with sufficient surety in the sum of $10,000 dollars, conditioned as the law directs, within 21 days from the entry of the Final Decree herein.

Entered on the
19th day of November, 1976.

/s/ William G. Plummer
JUDGE

I ask for the above,
reserving all objections
and exceptions to the
previous action of the
Court:

/s/ Paul Lee Sweeny
PAUL LEE SWEENY, P.D.,
3124 North 10th Street,
Arlington, Virginia 22201

Seen:

/s/ David T. Stitt
DAVID T. STITT, P.Q.
Assistant County Attorney
4100 Chain Bridge Road,
Fairfax, Virginia 22030

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GILBERT R. KNOWLTON, et al.,
Complainants

v.

GERVAIS JOSEPH SEWELL,
Defendant

IN CHANCERY NO. 48079

Defendant's Objections To Final Decree

Comes now the defendant, Gervais Joseph Sewell, by Counsel, pursuant to leave of Court first had and obtained, and files the following written objections and exceptions to the Final Decree entered herein on November 5, 1976, said objections having been made orally in part, and partly in writing prior to the entry of said Final Decree, no court reporter being present to take down the same:

* * * *

And the defendant duly noted his objection to the failure of the Court to include in said Final Decree the previous finding of the Court to the effect that the evidence showed that defendant has the right to carry on his excavation and landscape business on said property as nonconforming uses which ante-dated the adoption of the County Zoning Ordinance; and defendant further objected to so much of said final decree as enjoined sale or removal of topsoil from said property, except where allowed by law, as being too broad as to the persons affected thereby, and as being too vague and uncertain, and for the reason such use is incidental to the operation of the permitted landscape and

excavation business of the defendant * * *; and defendant further objected and excepted to those portions of the said Final Decree which found that defendant was operating a landfill operation on said property in violation of said zoning ordinance, and that the same constituted a nuisance, as being contrary to the evidence which showed said dumping operation to have been carried on prior to the adoption of said ordinance, and there being no evidence that the same constituted a nuisance; and defendant objected and excepted to that portion of said Final Decree which enjoined him from dumping or discharging on said property any substance of any type or description, except those substances which are permitted by law to be discharged, as being too vague and indefinite, and as denying defendant equal protection of the law and due process of the law and contrary to the law and the evidence; and defendant objected and excepted to the requirements that he implement the so-called "restoration" plan submitted by the County, as being without evidence to support said requirement, and the same being contrary to the law and the evidence in this case; * * * * and for the failure and refusal of the Court to dismiss this suit because of the failure of the complainant county to give defendant notice of all claimed violations of the said zoning ordinance and a reasonable opportunity to correct the same, as required by the said ordinance, before the commencement of this suit, such failure constituting a lack of due process of law herein; * * * *.

/S/ Gervais Joseph Sewell
Gervais Joseph Sewell, Defendant
By Counsel

ORDINANCES INVOLVED

Zoning Ordinances of Fairfax County

Section 30-1.8.36.1. "*Use Accessory.* A use which is customarily incidental and subordinate to the principal use of a lot or a building and which is located on the same lot therewith."

Section 30-3.2.1. "The uses permitted in each district shall be deemed to include uses and buildings therefor that are customarily accessory and incidental to such permitted uses and are located on the same lot therewith * * *."

Section 30-14.1. "Any building erected contrary to any of the provisions of this chapter and any use of any building or land which is conducted, operated or maintained contrary to any of the provisions of this chapter shall be and the same is hereby declared to be unlawful. The zoning administrator may intitiate injunction, mandamus, abatement or any other appropriate action to prevent, enjoin, abate or remove such erection or use in violation of any provision of this chapter. Such action may also be instituted by any property owner who may be particularly damaged by any violation of any provision of this chapter.

"Upon his becoming aware of any violation of any provisions of this chapter, the zoning administrator shall serve notice of such violation on the person committing or permitting the same, and if such violation has not ceased within such reasonable time as the zoning administrator has specified in such notice and a new certificate of occupancy obtained as provided in subsections 30-9.1 through 30-9.10, he shall institute such action as may be necessary to terminate the violation."